

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DONALD WILSON,

Petitioner,

v.

Civil Action No. 3:05CV102
(CHIEF JUDGE KEELEY)

EVELYN SEIFERT and
JIM RUBENSTEIN,

Respondents.

MEMORANDUM, OPINION AND REPORT AND RECOMMENDATION

This case was initiated on September 22, 2005, by the filing of a Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. In the petition, the *pro se* petitioner challenges a conviction and sentence imposed in the Circuit Courts of Wood and Marshall Counties, West Virginia. Presently before the Court is the Respondents' Motion to Dismiss claiming the petition is moot. On September 8, 2006, notice pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), was issued to the Petitioner advising him of his right to file a response to the Respondents' dispositive motion. Petitioner filed no response. Accordingly, this case is before the undersigned for a report and recommendation pursuant to Standing Order No. 2 and LR PL P § 83.13, et seq.

I. Factual and Procedural Background

A. Petitioner's Conviction and Sentence

According to the parties, Petitioner was convicted in the Circuit Court of Wood County, West Virginia, on July 9, 1992 of two counts of grand larceny and one count of burglary and was sentenced to two to twenty years on all three counts to run consecutively. Petitioner was convicted

of an offense by a convict in the Circuit Court of Marshall County, West Virginia, on February 8, 1995 and sentenced to a term to be served consecutively to the previous sentence.

B. State Post-Conviction Proceedings

1. Habeas Corpus Petition

Petitioner filed a writ of habeas corpus in the Circuit Court of Fayette County, West Virginia, March 30, 2004 alleging he had been imprisoned improperly because the Department of Corrections miscalculated his good time credit. The petition was dismissed April 12, 2004. Petitioner sought a writ of mandamus in the West Virginia Supreme Court of Appeals May 12, 2004 on the same issue. The writ was dismissed October 22, 2004.

C. Petitioner's Federal Habeas

Petitioner alleges his good time credit has been miscalculated and he is entitled to release.

D. The Respondents' Motion to Dismiss

In the motion to dismiss, Respondents argue that Petitioner has been released from custody and his petition is moot.

II. Analysis

The United States Supreme Court has held that a habeas petitioner's challenge to revocation of his parole is moot after he is released from prison. Spencer v. Kenma, 523 U.S. 1(1998). In this case petitioner has been released. The issue of good time credit is moot since it only relates to the date of release. Release of petitioner renders the petition moot.

III. Recommendation

For reasons set forth in this Opinion, it is recommended that the respondent's Motion to Dismiss (Doc. No. 13) be **DENIED AS MOOT**.

Within ten (10) days after being served with a copy of this Report and Recommendation, any party may file with the Clerk of Court written objections identifying those portions of the Recommendation to which objection is made and the basis for such objections. A copy of any objections should also be submitted to the Honorable Irene M. Keeley, Chief Judge, United States District Court. Failure to timely file objections to this Recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Clerk is directed to mail a copy of this Opinion/Report and Recommendation to the *pro se* Petitioner and any counsel of record.

DATED: February 27, 2007

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE